U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 July 2005

Case No.: **2004-LHC-02357**

OWCP No.: **06-190922**

In the Matter of:

ROBERT HUGHES,
Claimant,
v.
CAPE ROMAIN CONTRACTORS, INC. /
AMERICAN HOME ASSURANCE
c/o AIGS CLAIMS SERVICES,
Employer/Carrier,
and
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAM,
Party In Interest

Appearances:

On Behalf of the Claimant:
David P. Marvel, Esq.

On Behalf of the Employer/Carrier:
Nancy Bloodgood, Esq.

BEFORE: Richard K. Malamphy
Administrative Law Judge

DECISION & ORDER GRANTING BENEFITS

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 et seq. Robert Hughes ("Claimant") sustained a back injury while working as a diver for Cape Romain Contractors. ("Employer").

A formal hearing was held in Charleston, South Carolina on January 26, 2005, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

I. Preliminary Matters[1]

Claimant's Exhibits 1-9 and Employer's Exhibits 1-14 were submitted into evidence at the hearing. Tr. 22, 24, 36.

II. Issues

1. Whether Claimant's wage earning capacity is accurately reflected by his wage at Cape Romain.

2. Whether Claimant's average weekly wage should be computed using Section 10(a) or Section 10(c) of the Act.

III. Stipulations

The parties have stipulated to and I find the following facts:

1. That Claimant Robert Hughes was an employee of Cape Romain Contractors on March 3, 2003;

2. That they are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act;

3. That venue properly lies in Charleston, South Carolina;

4. That the medical reports submitted by the parties are sufficient without the oral testimony of the medical providers;

5. That Claimant reached maximum medical improvement on September 9, 2003 and was given an impairment rating by his physician of choice, Dr. Johnson of 20% to the whole person and 15% to the back;

6. That Claimant returned to work at Cape Romain Contractors where he is currently employed and he is being paid $95.60 compensation weekly.

Tr. at 21.

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[1] *The following abbreviations will be used as citations to the record:*

JS - *Joint Stipulations;*
TR - *Transcript of the Hearing*
CX - *Claimant's Exhibits; and*
EX - *Employer's Exhibits.*

IV. Contentions

A. Claimant's Contentions

Claimant seeks temporary total disability compensation at a rate of $801.05 from the date of Claimant's injury on March 3, 2003 through his return to work on January 16, 2004, and compensation for permanent partial disability in the amount of $267.38 per week thereafter. Claimant's Brief at 20.

Claimant first argues that his wage earning capacity is less than that reflected by his actual wage at Cape Romain. Id. at 12. Claimant bases his argument on the assertion that Cape Romain is acting as a beneficent employer, and he could not earn his current wage of $15.00 per hour on the open market. Id. at 14.

Second, Claimant argues that his average weekly wage is based on incorrect average annual earnings as described in Section 10 of the Act. Initially, Claimant argues Section 10(c) should have been used to calculate Claimant's average annual earnings since his actual earnings in the year prior to his injury did not reflect a merit raise that he had received shortly before his injury, overtime, or the premium dive pay Claimant would have received in an average year. Id. at 18. In the alternative, Claimant argues that even under Section 10(a), he should have received $10,662.25 in compensation in 2004, when he actually received only $8,224.76. Id. at 19-20.

B. Employer's Contentions

Employer, while acknowledging some loss in Claimant's wage earning capacity due to his injury, maintains that it has voluntarily compensated Claimant for his injury under the Longshore Act at the rate of $95.60 per week, 66 2/3 % of $143.34, the difference between Claimant's pre-injury and post-injury earnings. Employer's Brief at 4. Furthermore, Employer re-employed Claimant after his injury with an hourly rate identical to the hourly rate he earned prior to his injury; Employer states that this is a necessary job involving surveying and clerical/computer tasks, and, were Claimant to leave this job for any reason, he could reasonably make at least $15.00 per hour on the open market. Id. at 5-10.

Employer also argues Section 10(a) is the appropriate basis for determining Claimant's average annual earnings, since Claimant worked "substantially part of the year" preceding his injury at Cape Romain. Id. at 14-5.

V. Facts

Claimant is a fifty-six year old man who has spent most of his career working as a skilled laborer and diver. Tr. 37-8. He earned an Associate's Degree in electrical engineering in 1996 from Trident Technical College. Id. at 38. Claimant began working at Cape Romain Contractors in 1996. Id.

Claimant was injured on March 3, 2003 when a co-worker slipped and caused Claimant to bear the weight of a 240 pound piece of equipment. Id. at 41. As a result of his injury, Claimant can no longer dive. Id. at 43.

Claimant returned to work with Employer on January 16, 2004. Employer's Brief at 2; JS 6.

VI. Discussion

A. Wage Earning Capacity

"Wage-earning capacity" refers to "an injured employee's ability to command regular income as the result of his personal labor." Seidel v. Gen. Dynamics Corp., 22 BRBS 403, 405 (1989) (citing 2 Larson, The Law of Workmen's Compensation § 57.51 at 10-164.64 (1987)).

Section 8(h) of the LHWCA provides:

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided*, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. § 908(h).

Section 8(h) mandates a two-part analysis in order to determine the claimant's post-injury wage-earning capacity. Devillier v. Nat'l Steel & Shipbuilding Co., 10 BRBS 649, 660 (1979). The first inquiry requires the Administrative Law Judge to determine whether the claimant's actual post-injury wages reasonably and fairly represent his wage-earning capacity. Randall v. Comfort Control, Inc., 725 F.2d 791, 796, 16 BRBS 56, 64 (CRT) (D.C. Cir. 1984). If the actual wages are unrepresentative of the claimant's wage-earning capacity, the second inquiry requires that the judge arrive at a dollar amount which fairly and reasonably represents the claimant's wage-earning capacity. Id. at 796-97, 16 BRBS at 64. If the claimant's actual wages are representative of his wage-earning capacity, the second inquiry need not be made. Devillier, 10 BRBS at 660.

The party contending that the claimant's actual wages are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. See Grage v. J.M. Martinac Shipbuilding, 21 BRBS 66, 69 (1988), aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990).

In Devillier, the Benefits Review Board discussed the concept of wage earning capacity at length. Devillier, 10 BRBS at 654. "The ultimate objective is . . . to determine the wage that would have been paid in the open labor market under normal employment conditions to claimant

as injured. . . ." Id., quoting 2 A. Larson, Workmen's Compensation Law 57.21, at 10-38-39 (1974) (internal quotation marks omitted). In determining that theoretical wage, the Administrative Law Judge is required to consider a number of factors or variables. Devillier, 10 BRBS at 656, quoting 33 U.S.C. 908(h).

"Consideration of these 'variables' in cases arising under the Act must start with the statute. Section 8(h) lists 'the nature of his injury, the degree of physical impairment, [and] his usual employment' as factors requiring 'due regard' in fixing a reasonable wage-earning capacity." Id. quoting 33 U.S.C. 908(h). The Board hastened to clarify that the inquiry into wage earning capacity does not end there: "the fact finder is admonished to investigate 'any other factor or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future." Id.

Subsequent case law has delineated factors including the following which should be considered in determining both prongs of the Devillier test: 1)beneficent employer; 2)claimant's earning power on the open market; 3) whether the claimant is required to expend more time, effort or expertise to achieve pre-injury production; 4) whether claimant can perform his pre-injury physical work; 5) general economic factors; 6) claimant's education; 7) claimant's age; regularity of the post-injury employment; 8) claimant's medical disability; 9) testimony of a vocational expert; 10) loss of overtime; 11) whether medical and other circumstances indicate a probable future wage loss due to the work-related injury; 12) continuity and stability of claimant's post-injury work. See Abbott v. Louisiana Ins. Guar. Ass'n., 27 BRBS 192 (1993), aff'd, 40 F.3d 122 (5th Cir. 1994); Fleetwood v. Newport News Shipbuilding & Dry Dock Co., 776 F.2d 1225 (4th Cir. 1985); Randall v. Comfort Control, Inc., 725 F.2d 791 (D.C. Cir. 1984); Warren v. Nat'l Steel & Shipbuilding Co., 21 BRBS 149, 153 (1988).

1. Claimant's Actual Wage as Basis For Wage Earning Capacity

I must first determine whether Claimant's actual wages reasonably and fairly represent Claimant's wage earning capacity. Randall, 725 F.2d at 796, 16 BRBS at 64 (CRT).

Currently, Claimant works for Employer as a skilled laborer, whose tasks include surveying, computer work, "and a little bit of errand running because of his physical limitations." CX 3 at 6 (Deposition of Horry Parker). Employer created this position for Claimant, and it is "tailored" to Claimant's work restrictions. Id. at 6-7. Mr. Parker, Employer's vice president and treasurer, testified at deposition that Employer would probably not hire another person to fill Claimant's position if he were no longer there. Id. at 7. Claimant spends about half of his time surveying, and half of his time working in the office. Id. at 8. Claimant is paid $15.00 per hour – the same base rate he was being paid at the time of his injury in 2003. Id. at 13. Claimant has not had a raise since that time. Id.

Both parties presented evidence from vocational experts regarding Claimant's wage earning capacity.

Jerry Albert, Employer's vocational expert, testified at the hearing in this case and submitted a vocational evaluation prepared in October 2003. Tr. 87, EX 11, CX 7. Based on Claimant's medical and vocational history as well as vocational test results, Mr. Albert found

Claimant had a number of transferable skills, including: "above average learning ability / numerical ability / spatial ability / perception and average level of: verbal ability / clerical aptitude / form perception and manual dexterity." EX 11 at 45. Claimant's Functional Capacity Evaluation "placed him in the medium/heavy demand classification level. It demonstrated that he should never bend or crawl. On a frequent basis, he is able to perform sitting, standing, walking, reaching, squatting, kneeling and climbing." Id. Mr. Albert also noted Claimant's interest in computers including his completion of an on-line programming course, and his ability to type about 40 words per minute. Tr. at 93.

Mr. Albert testified based on his findings during Claimant's vocational evaluation in October 2003, and Claimant's subsequent work history, that Claimant would be able to work as a computer operator, which in the Charleston area has a mean wage of $16.57 per hour; a data entry clerk with a mean wage of $11.05 per hour; or a word processor with a mean wage of $13.89 per hour. Tr. at 115-17. Mr. Albert further testified that Claimant's work restrictions do not make him less employable in these categories. Id. at 117. Mr. Albert also indicated that computer support specialists and data base administrators in the Charleston area make $17.28 per hour to $22.78 per hour, but those jobs typically require a four year degree, while Claimant has a two year technical degree. Id. at 119-20. Finally, Mr. Albert testified Claimant has the "intellectual capacity" to pass the courses necessary to become a licensed surveyor, but admitted that he did not have any knowledge of those licensure requirements. Id. at 120.

None of the jobs Mr. Albert discussed in his testimony were presented to Claimant's physician, Dr. Johnson, for approval. Id. 108.

Claimant presented the deposition and report of Dr. Robert Brabham, a licensed psychologist and rehabilitation counselor. CX 5 at 3. Dr. Brabham met with Claimant August 8, 2003 and reviewed pertinent medical records, Claimant's history, and administered psychological tests. Dr. Brabham concluded:

> Based on his age, his educational background, his vocational history (with attention to possible transferable skills), his well-documented impairments and the resulting limitations that those impairments impose, and with due consideration to the pain that he experiences without pain medications, and the negative side effects of when he takes medication, it is my opinion, to a high degree of professional certainty, based on more than thirty-five years of experience that he is unable to engage in full-time gainful, competitive employment in his present medical condition.

Id. at Psychological Evaluation & Vocational Evaluation 6.

At deposition, Dr. Brabham testified that he was familiar with Claimant's current employment, stating, "it's one of those job descriptions that don't exactly sound right." Id. at 21. Dr. Brabham indicated that Claimant was making manuals, entering data into the company's computer, running errands, and working as a "kind of surveyor's helper." Id. at 21-2. Claimant indicated to Dr. Brabham "that he was needing to . . . take breaks on a frequent basis. . . . He also indicated that, by the time he . . . left there at three o'clock in the afternoon, that he was, quote, exhausted." Id. at 22. Dr. Brabham stated that this was because "[p]ain grinds people down . . . . And he was basically running out of juice . . . . And another way he described that, he said, I'm sort of good to go Monday through Wednesday, I'm dragging by Thursdays and

Fridays, and I really have to have the weekend to recover in order to go back and do it again." Id. at 22-23.

Dr. Brabham also gave his opinion as to the wages Claimant could earn in a competitive job market. Tr. 23. After acknowledging that Claimant has gotten an associates degree and has some computer skills, Dr. Brabham opined Claimant had very few transferable skills and very little wage earning capacity. Id. at 24. Speaking of Claimant's computer skills, Dr. Brabham stated, "You can go over here to Trident Tech and hire those folks coming out literally every single semester. And on the open market, just pure clerical data entry, you're looking in the range of 8 to $10 an hour depending on age or hours." Id. Surveyor helpers, who have surveying knowledge but, like Claimant, are not licensed surveyors, earn $6.00 per hour to $7.50 per hour. Id. at 25. Couriers earn, at the most, $8.50 per hour. Id.

Dr. Brabham further testified that he doubted Claimant could compete on the open market for a position similar to that at Cape Romain: "This man would be very, very hard to place with those conditions, age, previous injury, workers' comp claims. That scares people to death. And we all know it. And everybody denies it, of course, but it is true." Tr. at 29-30.

Dr. Donald R. Johnson, the Claimant's physician, was also deposed in this case. CX 4. He described Claimant's condition as follows:

> He has, in non-medical terms, a bad looking back. But if I read my note from that date, he has evidence of an old fracture at the first lumbar vertebrae. He has degenerative changes with multiple tears of his discs, and he has disc protrusions at two discs; the 4-5, 5-1 disc. The worse level being the 4-5 disc with central herniation and some nerve impingement. So he has a number of different things wrong with his back.

CX 4 at 6. Dr. Johnson testified that his back condition would "probably stay stable or gradually get worse" as Claimant ages. Id. at 8.

Dr. Johnson also testified that Claimant's impairment rating "really doesn't have much to do with [his] abilities, current and future, it has to do medically with" Claimant's injuries. Id. at 9. Dr. Johnson further explained, "I find looking through the categories of the [impairment guidelines], that they don't capture . . . this gentlemen's multiple problems, don't fit neatly into one of these categories." Id. at 13. Rather, Dr. Johnson "used [his] best judgment and came up with" the 15% lumbar spine impairment. Id. at 13-17.

Based on the above discussion, I find Claimant's wage of $15.00 per hour at Cape Romain Contractors does not fairly nor reasonably represent his actual wage earning capacity. Rather, I find Cape Romain is acting as a beneficent employer since it created the position for Claimant, fully accommodates his restrictions, and would not fill the position with someone if Claimant were no longer employed by Cape Romain. See Burch v. Superior Oil Co., 15 BRBS 423, 427 (1983) (holding, "Beneficence" includes arranging job locations to meet the claimant's physical restrictions, hiring an extra person to help him with heavy work, and paying him more than his co-workers"); Patterson v. Savannah Mach. & Shipyard, 15 BRBS 38, 42 (1982) (stating beneficence includes creating a position for the claimant which would not necessarily be filled if he left and treating him with "kid gloves").

Furthermore, Claimant is 56 years old, earned an associate's degree in electrical engineering in 1996, and has spent most of his professional life performing physical labor. Tr. 37-40. While Employer's vocational expert, Mr. Albert, discussed various highly skilled computer positions, Employer did not submit evidence showing Claimant was qualified for those positions by either his post-injury work experience or his nine year old associate's degree. Rather, Dr. Brabham's evaluation considered Claimant's age and physical condition as well as his post-injury work experience and education. It is highly unlikely that Claimant would be able to command $15.00 per hour in a competitive job.

2. Fair and Reasonable Representation of Wage Earning Capacity

Having determined that Claimant's actual wages do not fairly nor reasonably represent his wage earning capacity, I must now determine a precise dollar amount that does accurately represent Claimant's wage earning capacity. Randall, 725 F.2d at 796-7, 16 BRBS at 64 (CRT). The same factors that are used to determine whether actual wages accurately reflect wage-earning capacity are used to determine the claimant's post-injury earning capacity when his actual wages are not an accurate reflection of that capacity. Devillier, 10 BRBS at 660 (1979).

While neither party submitted a labor market survey into evidence, both vocational experts testified as to they type of job for which he believed Claimant was qualified. As discussed *supra*, Employer did not demonstrate that Claimant is in any way qualified for the positions mentioned by its vocational expert, Mr. Albert. While Mr. Albert discussed computer operator, data entry, computer programming and surveyor positions, he did not demonstrate that Claimant had any relevant experience in those fields. Furthermore, Mr. Albert disclosed on cross-examination that some of the positions he discussed required a four-year college degree. Finally, Mr. Albert did not display knowledge of the licensure requirements for surveying work, with which Claimant would need to comply if he were to become a surveyor.

Dr. Brabham, on the other hand, testified as to the wage Claimant would receive on the open market for the work he is currently doing for the employer. As this work is within Claimant's medical restrictions, I find that it is relevant for determining Claimant's wage earning capacity. Dr. Brabham testified that surveyor's helpers, couriers, and general clerical workers earn $6.00 to $10.00 per hour. Thus, based on that testimony, I find $10.00 per hour to be a reasonable and fair representation of Claimant's post-injury wage earning capacity, without overtime. See Claimant's Brief at 20.

B. Average Weekly Wage

Claimant argues his average weekly wage should be recalculated based on Section 10(c) of the Act, since the current calculation under 10(a) does not take into effect Claimant's merit raise received immediately prior to his injury, overtime, and the premium dive pay he would have received in an average year.

The Act provides three methods for computing Claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who worked "in the employment in which he was working at the time of injury, whether for the same or another

employer, during substantially the whole of the year immediately preceding his injury." 33 U.S.C. §910(a). Section 10(a) aims at a theoretical approximation of what Claimant could ideally expect to earn, so time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. See Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990); O'Connor v. Jeffboat, Inc., 8 BRBS 290, 292 (1978).

While "[s]ubsections (a) and (b) are the basic formulae for determining average annual income" the Administrative law judge may use subsection (c) when the other provisions "cannot reasonably and fairly be applied." SGS Control Services v. Director, OWCP, 86 F.3d 438 (5th Cir. 1996), citing Empire United Stevedores v. Gatlin, 936 F.2d 8119, 822 (5th Cir. 1991).

Here, Claimant clearly worked "substantially the whole of the year immediately preceding his injury." Claimant has been employed by Cape Romain since 1996. Thus, Section 10(a) applies to determine Claimant's average annual earnings, unless it cannot be fairly or reasonably applied. 33 U.S.C. § 910(a); Hole v. Miami Shipyards Corp., 12 BRBS 38 (1980). Although Employer argues, "there is no evidence that 'harsh results' would follow by applying §910(a)," Employer's Brief at 17, but Claimant no longer has the benefit of his dive pay and overtime pay under the §910(a) computation.

According to Horee Parker, the vice president of Cape Romain Contractors, Claimant would have worked all of the hours that the dive crew worked. CX 3 at 12. Claimant made an additional $5.00 per hour, for a total of $20.00 per hour, while diving. Id. at 10. Although the number of hours Employer's divers spend actually in the water each year varies, the average amount of dive time for the years 1999-2003 was 687 hours per year. Claimant's Brief at 19; Tr. at 56. Furthermore, Mr. Parker testified that the dive crew worked five to seven hours per week overtime, paid at time-and-a-half. CX 3 at 9.

Given the fact that dive time alone would provide Claimant with an additional $3,435 per year, it hardly seems reasonable or fair to disregard that portion of Claimant's pay in the average weekly wage analysis. Thus, Section 10(a) cannot be used to determine Claimant's average annual earnings.

Section 10(b) applies to an injured employee who has not worked substantially the whole year, but"[t]o invoke the provision of [Section 10(b)] the parties must submit evidence of similarly situated employees. Menard v. Coastline Inc., 38 BRBS 95, 108 (ALJ) (2004) (citing Hall v. Consolidated Emp. Sys., Inc. 139 F.3d 1025, 1031 (5th Cir. 1998)).

Since neither party submitted evidence of a similarly situated employee, the provisions of Section 10(b) cannot be invoked in this case. Id.

When neither Section 10(a) nor Section 10(b) apply, the Administrative Law Judge must determine Claimant's average weekly wage pursuant to the "catch all provision" of Section 10(c). 33 U.S.C. §910(c); Louisiana Ins. Guaranty Assoc. v. Bunol, 211 F.3d 294, 297 (5th Cir. 2000). Section 910(c) provides:

> [S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was

> working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c).

It is well-established that the Administrative Law Judge has broad discretion in determining average weekly wage under Section 910(c). James J. Flanagan Stevedores, Inc. v. Gallagher, 219 F.3d 426 (5th Cir. 2000). The object of Section 10(c) is to arrive at a sum that reasonably represents a Claimant's annual earning capacity at the time of injury. Empire United Stevedores v. Gatlin, 936 F.2d 819, 823 (5th Cir. 1991).

In determining Claimant's average annual earnings pursuant to Section 10(c), the wage at the time of injury is to be multiplied by a variable reasonably representing the amount of work that normally would have been available to Claimant. Cummins v. Todd Shipyards Corp., 12 BRBS 283 (1980); Matthews v. Mid-States Stevedoring Corp., 11 BRBS 509 (1979).

I find the calculation presented by Claimant to be reasonable and to fairly take into account both Claimant's customary over-time earnings and the dive differential pay. Thus, I find that Claimant's average annual earnings should be calculated as follows: 49 hours per week (40+6(1.5)) of $15.00 per hour time, resulting in a base wage of $735 per week, or $38,220 per year. Claimant's dive pay should be based on the average amount of dive time for the years 1999-2003, 687 hours per year. Thus, Claimant is entitled to an additional $3,435 per year, resulting in total average annual earnings of $41,655, or an average weekly wage of $801.05. See Claimant's Brief at 19.

C. Calculations

Claimant has an unscheduled injury, and is thus entitled to benefits under Section 8(c)(21) of the Act. Pursuant to that section, Claimant's compensation is determined by calculating 66 2/3% of the difference between Claimant's pre-injury average weekly wage and his post-injury wage earning capacity. Based on the foregoing discussion, Claimant has an average weekly wage of $801.05 and a wage earning capacity of $400.00. Thus, Claimant's compensation is 66 2/3% of $401.05, or $267.38 per week.

D. Voluntary Abandonment

Employer indicated in its brief that Claimant has tendered his resignation to Cape Romain Contractors to pursue a real estate career. Employer's Brief, Appendices A, C. However, the parties did not submit briefs on this issue and there is insufficient information in this record to determine the effect Claimant's resignation will have on his benefits. That issue may be raised at the District Director level if Claimant has resigned his position at Cape Romain.

E. Attorney Fees

Employer objected to Claimant's request for attorney fees and requested an assessment of costs and fees against Claimant pursuant to 33 USC §926, on the grounds that Claimant's counsel prematurely requested referral of this case to the Administrative Law Judge level. The issue of attorney fees will be decided when Claimant submits a fully supported fee application. Employer should make its objections at that time.

VII. Order

1. The stipulations between the Employer and the Claimant are binding.

2. The compensation rate for total temporary disability is $801.05 per week, from the date of injury, March 3, 2003, through January 16, 2004, the date Claimant returned to work.

3. The compensation rate for permanent partial disability is $268.38 per week, from the date Claimant reached maximum medical improvement, September 9, 2003, and continuing.

4. Employer shall receive credit for all compensation that has been paid.

5. Interest at the rate specified in 28 U.S.C. §1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

6. All computations are subject to verification by the District Director.

7. The Claimant's attorney shall within 20 days of the receipt of this order, submit a fully supported fee application, a copy of which shall be sent to opposing counsel, who then shall have ten (10) days to respond with objections thereto.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/vlj
Newport News, Virginia